

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 14, 2006

STATE OF TENNESSEE v. LAMONT DESHAWN RUTLAND

**Direct Appeal from the Criminal Court for Davidson County
No. 2002-A-416 Cheryl Blackburn, Judge**

No. M2005-01395-CCA-R3-CD - Filed June 9, 2006

Defendant, Lamont Deshawn Rutland, appeals the trial court's revocation of his probation. After a review of this matter, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which and DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

David M. Hopkins, Nashville, Tennessee, for the appellant, Lamont Deshawn Rutland.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Bret Gunn, Assistant District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

Defendant entered a plea of guilty to two counts of rape on October 2, 2003. The trial court sentenced Defendant to concurrent eight year sentences, all of which was suspended, and Defendant was placed on supervised probation. A warrant of violation of probation was issued on February 18, 2005, alleging that Defendant had failed (1) to schedule the requisite polygraph test; (2) to report to the Davidson County Probation Office as required; (3) to report to the Wilson County Probation Office as instructed; (4) to notify his Davidson County probation officer when he changed addresses in July 2004 and December 2004; (5) to pay the required fees; and (6) to resume sex offender treatment and counseling pursuant to T.C.A. § 39-13-706 after being discharged from the program for absenteeism and failure to pay fees.

At the probation revocation hearing, Joyce Johnson, Defendant's Davidson County probation officer, testified that Defendant initially complied with the directives of his probation. Defendant, who was required to report to her twice a month, met his appointment schedule from November

2003, until approximately October 2004, after which his reporting became sporadic. Ms. Johnson said that Defendant moved twice in 2004 without reporting his change of address as required. Ms. Johnson discussed these violations with Defendant who stated that he missed his appointments because he did not have transportation from Wilson County, where he lived, to Davidson County. Ms. Johnson contacted the Wilson County Probation Office and requested that they accept the transfer of Defendant's probation supervision. The Wilson County Probation Office agreed to the transfer despite Defendant's noncompliance with the terms of his probation and scheduled a home visit. The Wilson County probation officer, however, reported to Ms. Johnson that no one answered the door when he attempted to visit Defendant at his residence despite the fact that there were cars parked at the house. He eventually contacted Defendant and scheduled two alternative appointments, but Defendant did not show up on either date. The Wilson County Probation Office subsequently declined to accept the transfer of Defendant's probation supervision.

Ms. Johnson said that Defendant was discharged from the sexual offender treatment program on November 11, 2004. Ms. Johnson spoke with Mr. Brogden, a counselor at the treatment center, who agreed to readmit Defendant to the program if he paid the past due fees in the amount of \$105.00. Ms. Johnson said that Defendant did not follow through with this plan.

On cross-examination, Ms. Johnson said that Defendant was working during the period of her supervision at a fast food restaurant for approximately \$7.50 per hour. Ms. Johnson said that Defendant did not provide her any information concerning his child support obligations or the cost of his prescription drugs.

Defendant testified that he had worked at Wendy's Old Fashioned Hamburgers in Lebanon since 2000. He worked approximately thirty-two hours per week at \$7.60 per hour. Defendant stated that \$160.00 was deducted from his paycheck every two weeks for child support. He said that he paid approximately \$400 per month for his prescription drugs, but acknowledged that his brother sometimes helped with this cost. Defendant said that he did not have a driver's license, and that he sometimes missed his scheduled appointments because his girlfriend could not bring him to Nashville because of her work schedule. Defendant said that his employer gave him rides to and from work each day. Defendant said that he attempted to find a second job but was unsuccessful because of his prior felony convictions.

On cross-examination, Defendant acknowledged that he agreed to abide by the terms of his probation when he entered his plea of guilty to the rape charges. Defendant also acknowledged that he had been placed on probation for an unrelated charge in 1999, but he denied that he had been found in violation of that probation. Defendant agreed that he had missed some of his scheduled appointments with Ms. Johnson and the sexual offender treatment program. Defendant said that Ms. Johnson told him he had to move from his father's residence where he was living at the time he was placed on probation because his seventeen-year-old sister was living at the residence. Defendant said he moved back to his father's house after his sister turned eighteen. Defendant said he had taken a second job at PFG Food Distributors at some point during his probation but was terminated after approximately one month because of problems with his supervisor.

At the conclusion of the revocation hearing, the trial court found that Defendant had violated the terms of his probation stating:

[Defendant] was discharged from his treatment for excessive absenteeism and failure to pay. He never had his polygraph, sort of Ms. Johnson who was working with him trying to keep up with him, and then he doesn't even go to the probation officer in Wilson County who might have helped him out. So, I mean even with all the extenuating circumstances, which I understand he has, he has in fact violated his probation.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. Tenn. Code Ann. §§ 40-35-310, 311. The decision to revoke probation rests within the sound discretion of the trial court. *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation is subject to an abuse of discretion standard of review, rather than a *de novo* standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). Discretion is abused only if the record contains no substantial evidence to support the conclusion of the trial court that a violation of probation has occurred. *Id.*; *State v. Gregory*, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). Proof of a violation need not be established beyond a reasonable doubt, and the evidence need only show that the trial judge exercised a conscientious and intelligent judgment, rather than acting arbitrarily. *Gregory*, 946 S.W.2d at 832; *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995). The trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement. *See State v. Hunter*, 1 S.W.3d 643, 646 (Tenn. 1999).

Defendant admitted that he violated the terms of his probation. He argues, however, that his violations were not wilful, but rather the result of his financial inability to arrange transportation or pay the required fees for counseling. Ms. Johnson extended several opportunities to Defendant to alleviate his transportation difficulties by attempting to transfer the supervision of his probation to Wilson County and by working with Mr. Brogden at the sex offender treatment center to secure Defendant's readmission to the program. Defendant failed to follow through on either plan. Moreover, Defendant's failure to report his change of residences was not attributed to any financial problems he might have had. Based on our review of the record, we conclude that the trial court did not abuse its discretion by revoking Defendant's probation and ordering him to serve his sentence in confinement.

CONCLUSION

After review, we affirm the judgement of the trial court.

THOMAS T. WOODALL, JUDGE